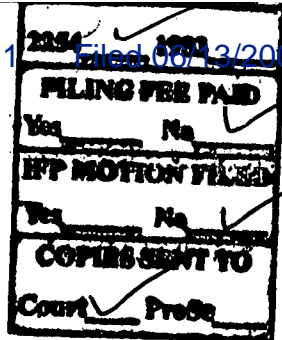
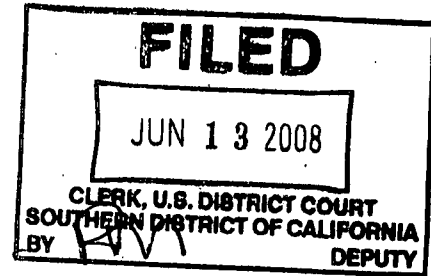


Name Pamela Jane Baker
Case 3:08-cv-01081-J-NLS Document 1
Address C512-9-2 Low
CCIOF, P.O. Box 1508
Chawchilla CA. 93610-1508
CDC or ID Number X15528



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MC-275



In the State of California
County of San Diego
(Court)

<u>Pamela J. Baker</u> Petitioner	vs.	<u>Deborah Patrick warden</u> Respondent
--------------------------------------	-----	---

PETITION FOR WRIT OF HABEAS CORPUS

No. **'08 CV 1081 J NLS**

(To be supplied by the Clerk of the Court)

INSTRUCTIONS — READ CAREFULLY

- If you are challenging an order of commitment or a criminal conviction and are filing this petition in the Superior Court, you should file it in the county that made the order.
- If you are challenging the conditions of your confinement and are filing this petition in the Superior Court, you should file it in the county in which you are confined.
- Read the entire form *before* answering any questions.
- This petition must be clearly handwritten in ink or typed. You should exercise care to make sure all answers are true and correct. Because the petition includes a verification, the making of a statement that you know is false may result in a conviction for perjury.
- Answer all applicable questions in the proper spaces. If you need additional space, add an extra page and indicate that your answer is "continued on additional page."
- If you are filing this petition in the Superior Court, you need file only the original unless local rules require additional copies. Many courts require more copies.
- If you are filing this petition in the Court of Appeal, file the original and four copies.
- If you are filing this petition in the California Supreme Court, file the original and thirteen copies.
- Notify the Clerk of the Court in writing if you change your address after filing your petition.
- In most cases, the law requires service of a copy of the petition on the district attorney, city attorney, or city prosecutor. See Penal Code section 1475 and Government Code section 72193. You may serve the copy by mail.

Approved by the Judicial Council of California for use under Rules 56.5 and 201(h)(1) of the California Rules of Court [as amended effective January 1, 1999]. Subsequent amendments to Rule 44(b) may change the number of copies to be furnished the Supreme Court and Court of Appeal.

This petition concerns:

- ☒ A conviction ☐ Parole
☐ A sentence ☐ Credits
☐ Jail or prison conditions ☐ Prison discipline
☐ Other (specify): _____

1. Your name: Pamela Baker
 2. Where are you incarcerated? Central California womens facelity
 3. Why are you in custody? ☒ Criminal Conviction ☐ Civil Commitment

Answer subdivisions a. through i. to the best of your ability.

- a. State reason for civil commitment or, if criminal conviction, state nature of offense and enhancements (for example, "robbery with use of a deadly weapon").

Conspiracy, burglary, recieving stolen property,
Two prior convictions

- b. Penal or other code sections: PC 182(A)(1) 459, 460, 487(A) 476, 667, (A) 667(B) (F) 1170.12

- c. Name and location of sentencing or committing court: San Diego Superior Court
The state of California In and for the county of Sandiego

- d. Case number: SCD192576

- e. Date convicted or committed: 12/8/05

- f. Date sentenced: 11/1/05

- g. Length of sentence: Base Term 8 years + 10 yrs Enhancements (2) 16 month

- h. When do you expect to be released? November 6th 2021

- i. Were you represented by counsel in the trial court? ☒ Yes. ☐ No. If yes, state the attorney's name and address:

Lei-chala I Wilson, Deputy Public Defender SBN: 144636
233 "A" st 300, San Diego, CA 92101 Tel. (619) 338-4834

4. What was the LAST plea you entered? (check one)

☒ Not guilty ☐ Guilty ☐ Nolo Contendere ☐ Other: _____

5. If you pleaded not guilty, what kind of trial did you have?

☒ Jury ☐ Judge without a jury ☐ Submitted on transcript ☐ Awaiting trial

Ground 1: State briefly the ground on which you base your claim for relief. For example, "the trial court imposed an illegal enhancement." (If you have additional grounds for relief, use a separate page for each ground. State ground 2 on page four. For additional grounds, make copies of page four and number the additional grounds in order.)

Ms. Bakers conviction of receiving stolen property (count six) should be reversed, Because she was convicted of the theft of the same property (Count Five) And she cannot properly be convicted of Both.

a. Supporting facts:

Tell your story briefly without citing cases or law. If you are challenging the legality of your conviction, describe the facts upon which your conviction is based. If necessary, attach additional pages. **CAUTION:** You must state facts, not conclusions. For example, if you are claiming incompetence of counsel you must state facts specifically setting forth what your attorney did or failed to do and how that affected your trial. Failure to allege sufficient facts will result in the denial of your petition. (See *In re Swain* (1949) 34 Cal.2d 300, 304.) A rule of thumb to follow is: who did exactly what to violate your rights at what time (when) or place (where). (If available, attach declarations, relevant records, transcripts, or other documents supporting your claim.)

Ms. Baker was charged, in Count Five, with the theft of the property of Robert Bacon from the construction site on Baja Mar. and, in Count Six, of receiving stolen the same stolen property (CT 7-8) The jury convicted her on both counts (CT 104-105) Her conviction of receiving stolen property (count six) should be reversed, Because she cannot properly be convicted of both stealing and receiving the same property. It is a "fundamental principle" that a defendant may not be convicted of both stealing and receiving the same property. A principal in the actual theft of the property may be convicted pursuant to this section. However, no person may be convicted both pursuant to this

b. Supporting cases, rules, or other authority (optional):

(Briefly discuss, or list by name and citation, the cases or other authorities that you think are relevant to your claim. If necessary, attach an extra page.)

(People vs Allen (1999) 21 CAL 4th 846, 851) (People v Garza (2005) 35 CAL 4th 866, 874) (People v Jaramillo (1976) 16 CAL 3rd 752, 757; Pen Code 496 Subd (a)) Penal code section 496 Subd (A) People v. Donnell (1975) 52 CAL App3d 762, 768-769 continued

Argument 1 continued

section and of the theft of the same property." Thus a defendant may not be convicted of both theft and receiving stolen property, where the theft conviction is based, either necessarily or inferentially, on a finding that the defendant stole the same property he was convicted of receiving. The rule prohibiting dual convictions applies not only where the defendant is not the actual thief but also where the defendant is convicted of aiding and abetting the theft of the property he is also convicted of receiving.

Here count five of the amended information charged Ms Baker and Abshere with the theft of money and personal property from Robert Bacon, and count six of the amended information charged her with receiving the property, described as "assorted tools" which was taken from Bacon. Bacon testified the stolen property consisted of various tools, including a beam saw, a laser ~~saw~~ level, an impact wrench, a skid saw and a set of nail pouches. The jury convicted Ms

Argument 1 pg 3 continued

Baker on both counts "as charged in... the amended Information, the Verdict form for count five refers to "Victim Robert Bacon" while the Verdict form for count six refers to "Robert Bacon - assorted tools". The record thus establishes ms Baker was convicted, in counts five and six, of both taking and receiving the same property Bacons tools. Because she cannot properly be convicted of both stealing and receiving the same property, her conviction of receiving stolen property (count six) should be reversed.

Supporting Cases

Pen. Code 487 Subd (A) Pen. Code 496

People v Black (1990) 222 CA1 App 3d 523
525

The trial court erred by failing to instruct the jury that it could not convict MS Baker of both stealing and receiving the same property.

a. Supporting facts:

The trial court instructed the jury in the elements of both grand theft, and receiving stolen property. The court did not however, instruct the jury that it could not convict MS Baker of both. Because she was charged in counts five and six with stealing and receiving the same property, the trial court had a duty to instruct the jury, sua sponte, that it could not convict her of both offenses. The court's failure to instruct the jury on this point requires reversal of the conviction for receiving stolen property (Count six). The trial court has a duty to instruct the jury on the general principles of law relevant to the issues raised by the evidence. Where the pleadings and the evidence create a possibility the defendant will be impermissibly convicted of both theft and receiving the same stolen property. The trial court is required to instruct the jury, sua sponte, that it cannot convict the

b. Supporting cases, rules, or other authority:

Pen. Code 496, 487, (Ct 78-79) People v. St Martin (1970) 1 Cal 3d 524, 531 (People v Breverman) (1998) 19 Cal 4th 142, 154
People v. Strong (1994) 30 Cal App 4th 366, 375, 376. (People v Black Supr 222 Cal App 3d At 525) (United States v Gaddis (1976) 424 US 544, 559, S.Ct 1023, 1027, 47, L Ed. 2d 222, 228-229 (People v Davis (19 Cal 4th 301, 305) (People v Garza supra 35 Cal 4th at 881-882)

pg 2

Argument 2 continued

The defendant of both. [In an appropriate case, court is required to instruct the Jury they may not convict the defendant of both robbing a bank and receiving the proceeds of the robbery.]

In *People v Black* supra 222 Cal App 3d 523, For example the defendant was convicted of both stealing a pickup truck, in violation of Vehicle Code section 10851, and receiving the same vehicle as stolen property. The truck's owner had noticed his truck missing when he returned home at around midnight. The defendant was seen driving the stolen truck about two and one-half hours later. The record did not indicate whether the jury found the defendant had taken the truck or only driven it in violation of Vehicle Code section 10851. The court of Appeal concluded there was no evidence of more than one act or transaction, and the trial court was therefore, required to instruct the jury pursuant to CALJIC 17.03 that it could not convict the defendant of both stealing the truck and receiving it as stolen property. Similarly the defendant was charged with both unlawful taking and driving of a pickup truck.

Continued next page

Argument 2 page 3 continued.

and receiving the same truck as ~~a~~ stolen property. Noting that Vehicle Code Section 10851 prohibits both the unlawful taking and the unlawful driving of a vehicle, the court explained that whether a conviction for unlawful driving precludes a conviction for receiving the vehicle as stolen property depends on whether the driving occurred as part of the initial taking. "What matters is whether the driving was part of the theft, or an independent crime. If the evidence showed only one continuous violation

In order to find the defendant guilty you must all agree as to the particular crime committed, and, if you find the defendant guilty of one, you must find [Him][her] not guilty of the other

Because a prosecution insisted on presenting the case based on the alternate theories of unlawful taking and unlawful driving, the jury should have been instructed it could not convicted the defendant of receiving the truck as stolen property

continue

Continue Page 4 Argument 2.

if it convicted him of taking the truck or of driving it as part of the original taking. Similarly Ms Baker was convicted of aiding and abetting the theft of Bacon's property. The essential elements of such a theft include taking and carrying away the stolen property. Her receipt of Bacon's property was "Part and Parcel" of the taking and carrying away of that property in the course of the theft itself. Because of the theft of Bacon's property and Ms Baker's receipt of it were part of a single indivisible transaction - the theft of the property - the trial court was required to instruct the Jury ~~qua sponte~~ ^{sponte} that it could not convict her of both stealing and receiving Bacon's property. Because it is not reasonably probable a properly instructed jury would have convicted Ms Baker of both the theft of Bacon's property and receiving that same stolen property, her conviction of receiving stolen property (Count six) should be reversed.

7. Ground 2 or Ground 3 (if applicable):

The trial court abused its discretion under evidence Code section 352 when it admitted evidence of MS Baker's Prior convictions for impeachment.

a. Supporting facts:

of MS Baker

Over the objection, the court allowed the prosecution to impeach her with her two prior convictions, one for residential burglary, and one for Robbery. The prior convictions were admitted solely for the purpose of impeachment, the court having ruled pre-trial that they were not admissible in the prosecution's case in-chief as evidence of MS Baker's intent or mental state pursuant to evidence code section 1101 Subd(b) 4 R+51; 6B RT234-235, Ct 165) under the circumstances of this case the trial court abused its discretion under Evidence Code section 352, when it concluded the prior convictions probative value outweighed their prejudicial effect and allowed their use for impeachment.

Continued next page.

b. Supporting cases, rules, or other authority:

College Hospital, INC, v Superior Court (1994) 8 CA1 4th 704, 715
 (People v Castro Supra, 38 CA1.3d At 319;)
 (People v Watson (1956) 46 CA1 2d 818, 836)

page 2 of Argument 3. continued

Proposition 8 (CA1 Const, Art 1 §28 subd(d)(F) notwithstanding the trial court retains discretion under Evidence Code section 352 to preclude or limit the use of prior convictions for impeachment.

The factors which may be considered in the exercise of that discretion include

- (1) whether the prior conviction reflects on honesty and integrity (2) whether it is near or remote in time (3) whether it was suffered for the same or substantially similar conduct for which the witness accused is on trial and (4) what effect admission would have on the defendant's decision to testify

'Prejudice' in the context of Evidence Code section 352 refers to the possibility of misuse of evidence - use of evidence ~~of prior convictions~~^{PJO} use of the evidence by the trier of fact for a purpose for which the evidence is not properly admissible the admission into evidence ~~inferencing~~ ~~from the defendant's commission of~~

continue

page 3 of Argument 3 continued

of prior convictions of offenses which are the same as or similar to that for which the defendant is on-trial carries a substantial risk the jury will misuse the evidence inferring from the defendant's commission of past similar crimes that he has a propensity to commit such crimes and therefore is guilty of the crime with which he is charged.

"Where the prior conviction is for the same or substantially similar conduct as that for which the defendant is on-trial the danger is that the jury may conclude that the defendant has a propensity for committing that-type of offense and therefore he must have committed the one which he is charged. Use of that evidence for that purpose is prohibited by evidence code section 1101.

Careful scrutiny is therefore required

Page 4 Argument 3 continued

When weighing the probative value and prejudicial effect of prior convictions offered for impeachment, when they involve offenses which are the same as or similar to that for which the defendant is on trial

Here the critical disputed issue was MS Baker's mental state, whether she knew that Abshero intended to steal, and did steal, the tools and other items he took from the two construction sites and placed in her car, and whether she knew Abshero intended to burglarize the Blanchard residence. The trial court ruled before trial that the robbery and burglary of which MS Baker had previously been convicted were not admissible under Evidence Code section 1101 subd b) to show her intent or mental state at the time of the crimes with which she was charged in this case. The court nevertheless allowed the prosecution to use the prior convictions for impeachment, reasoning that their probative value on this issue of MS Baker's credibility outweighed their prejudicial effect. (C.B.R. 234-235) However, contrary to the court's analysis, in light of the issues and evidence in this case, the risk of undue prejudice resulting from the jury's misuse of the prior.

continued see attach

Page 5 Argument 3 continued

Convictions as propensity evidence outweighed their probative value on the issue of MS Baker's credibility. Here the admission of MS Baker's prior convictions carried a substantial risk ~~of~~ the evidence would be misused as propensity evidence. The prosecutor made it clear he intended to use the prior conviction to impeach MS Baker's testimony that she did not know Abshere was stealing the tools and other property, by implying that, because she had previously been convicted of burglary and robbery, she had an intent to steal on this occasion as well. (6B RT 231-234-295) Thus the Court was on notice that the prosecutor intended to suggest the jury misuse the prior conviction evidence as evidence of a propensity to steal. The court's comments at the time of the arguments and ruling on the admission of the prior convictions indicate the court was well aware of the potential for misuse of this evidence (6B RT 234-235, 293-294) Even assuming arguendo MS Baker's prior convictions had some probative value on this issue of her credibility, the substantial prejudice resulting from their use as propensity evidence far outweighed

Continue

Page 6 of Argument 3 continued

that probative value. The court nevertheless concluded the evidence's probative value outweighed its prejudicial effect (6B RT 234-235). Under the circumstances of this case, this determination was unreasonable and constituted an abuse of discretion.

It is reasonably probable the result in this case would have been more favorable to MS Baker, but for the admission of her prior convictions. MS Baker's principal defense was that she was an unknowing participant in the thefts committed by Abshere. She testified, in substance, that he did not tell her what he was doing, she remained in the car and did not enter any of the sites, and she could not see what he was doing while he was gone. (6B RT 260-266-271-272, 291-293) MS McCabe's observation at the Princeton Avenue scene were generally consistent with this testimony (6A RT 113; 118-125-126, 127-129). Without the evidence of her prior convictions,

Continue

Page 7 Argument 3 Continue

the jury could reasonably have concluded MS Baker had been taken in by Abshere and was an unknowing participant in his crime.

The admission of the evidence of MS Baker's prior convictions tipped the balance against her. MS Baker testified on direct examination that she did know the items Abshere took from the two construction sites were stolen, because Abshere told her he was retrieving them for his Uncle. (CB RT 260-262, 271-272)

Likewise, she testified she did not know Abshere intended to burglarize the Blanchard residence because ~~she~~ he told her he was delivering the tools and other items to his Uncle there (CB RT 264-265, 267, 271-272) on cross examination. The prosecutor asked a series of questions calculated to lead the jury to reason that, because MS Baker had previously been convicted of burglary and robbery, she would steal again and therefore was a knowing participant in the thefts committed by Abshere (CB RT 290-293) He accomplished this through a line questioning in which he

Continue

Page 8 Argument 3 continued

elicited MS Baker's testimony that she did not know what Abshere was doing. Then elicited an admission of her prior convictions (LB RT 290-293) He also asked MS Baker whether she had the intent to steal when she committed the prior crimes, thus suggesting the jury infer she had the same intent on the day in issue in this case (LB RT 291-292)

The limiting instruction given by the court was not sufficient to prevent the jury from using the evidence of MS Baker's prior convictions to infer that she was a knowing participant in the thefts because she had stolen before. The only limiting instruction given was CALJIC 2.23 which merely told the jury the evidence of MS Baker's prior convictions was to be used only for the purpose of determining her believability (CT 85; LB RT 300-301) The instructions did not preclude the jury from using the evidence of MS Baker's prior convictions in the manner suggested by the prosecutor, inferring that MS Baker was not truthful about her lack of knowledge, because she had previously committed theft-related offenses and thus had a propensity to steal. continue

Page 9 Argument 3 Continue

Under these circumstances, there is "a reasonable chance, more than an abstract possibility, that the result would have been more favorable to Mrs Baker if the prior conviction evidence had been excluded, for these reasons, the judgment should be reversed

Conclusion

For the reasons stated above Appallant Pamela J Baker respectfully requests the judgment be reversed

Case 3:08-cv-01081-RJS Document 1 Filed 06/13/2008 Page 19 of 26
8. Did you appeal from the conviction, sentence, or commitment? ☒ Yes ☐ No. If yes, give the following information:

a. Name of court ("Court of Appeal" or "Appellate Dept. of Superior Court"):

Court of Appeal, Fourth Appellate District, Division one

b. Result: Denied c. Date of decision: _____

d. Case number or citation of opinion, if known: DO 47708

e. Issues raised: (1) _____

(2) _____

(3) _____

f. Were you represented by counsel on appeal? ☒ Yes. ☐ No. If yes, state the attorney's name and address, if known:

Martha L. McGill State Bar 95785 191 Calle Magdalena Suite 270
ENCINITAS CA 92024.

9. Did you seek review in the California Supreme Court? ☐ Yes. ☒ No. If yes, give the following information:

a. Result: _____ b. Date of decision: _____

c. Case number or citation of opinion, if known: _____

d. Issues raised: (1) _____

(2) _____

(3) _____

10. If your petition makes a claim regarding your conviction, sentence, or commitment that you or your attorney did not make on appeal, explain why the claim was not made on appeal:

11. Administrative Review:

a. If your petition concerns conditions of confinement or other claims for which there are administrative remedies, failure to exhaust administrative remedies may result in the denial of your petition, even if it is otherwise meritorious. (See *In re Muzalski* (1975) 52 Cal.App.3d 500 [125 Cal.Rptr. 286].) Explain what administrative review you sought or explain why you did not seek such review:

b. Did you seek the highest level of administrative review available? ☐ Yes. ☐ No.

Attach documents that show you have exhausted your administrative remedies.

- Case 3:08-cv-01081-JNL Document 1 Filed 06/13/2008 Page 26 of 26
12. Other than direct appeal, have you filed any other petitions, applications, or motions with respect to this conviction, commitment, or issue in any court? ☐ Yes. If yes, continue with number 13. ☒ No. If no, skip to number 15.

13. a. (1) Name of court: _____
- (2) Nature of proceeding (for example, "habeas corpus petition"): _____
- (3) Issues raised: (a) _____
- (b) _____
- (4) Result (Attach order or explain why unavailable): _____
- (5) Date of decision: _____
- b. (1) Name of court: _____
- (2) Nature of proceeding: _____
- (3) Issues raised: (a) _____
- (b) _____
- (4) Result (Attach order or explain why unavailable): _____
- (5) Date of decision: _____

c. For additional prior petitions, applications, or motions, provide the same information on a separate page.

14. If any of the courts listed in number 13 held a hearing, state name of court, date of hearing, nature of hearing, and result:
- _____
- _____

15. Explain any delay in the discovery of the claimed grounds for relief and in raising the claims in this petition. (See *In re Swain* (1949) 34 Cal.2d 300, 304.)

Council didn't exhaust state remedies, federal district court
Said argument must be exhausted from state court

16. Are you presently represented by counsel? ☐ Yes. ☒ No. If yes, state the attorney's name and address, if known:
- _____
- _____

17. Do you have any petition, appeal, or other matter pending in any court? ☐ Yes. ☒ No. If yes, explain:
- _____
- _____

18. If this petition might lawfully have been made to a lower court, state the circumstances justifying an application to this court:
- _____
- _____

I, the undersigned, say: I am the petitioner in this action. I declare under penalty of perjury under the laws of the State of California that the foregoing allegations and statements are true and correct, except as to matters that are stated on my information and belief, and as to those matters, I believe them to be true.

Date: 6-6-08

► Pamela J. Baker
(SIGNATURE OF PETITIONER)

PROOF OF SERVICE

I hereby declare that I am over 18 years of age, a resident in the state of California and a party/not a party to the within cause of action. That on this date, I did cause a true and correct copy of the Writ of Habeas Corpus to be served on the parties to the action by (check appropriate boxes):

☒ depositing same in the U.S. Mail With first class postage prepaid and addressed as follows below:

☒ Attn: Filing Clerk
United States District Ct
Southern District of CA
880 Front St suite 4290
San Diego CA 92101 -
8900

☐ _____

VERIFICATION

I have read the above statements and do declare upon penalty of perjury that these statements are true and correct as based upon my information and belief.

Executed on this 10th day of June, 2008
at Chowchilla, California, pursuant to provisions of code of Civil
Procedures §§446 and 2015.5.

Pamela J Baker
DECLARANT

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7
8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
10

11 PAMELA J. BAKER,

12 Petitioner,

13 v.

14 DEBORAH L. PATRICK, Warden,

15 Respondent.

Civil No. 07cv2163 L (CAB)

**ORDER DISMISSING SECOND
AMENDED PETITION WITHOUT
LEAVE TO AMEND**

16 Petitioner is a state prisoner proceeding pro se with a Petition for a Writ of Habeas
17 Corpus pursuant to 28 U.S.C. § 2254. On November 15, 2007, the Court denied Petitioner's
18 application to proceed in forma pauperis because it appeared from her prison trust account
19 statement that she could afford to pay the \$5.00 filing fee. The Court also dismissed the Petition
20 because it presented only state law claims. Petitioner was instructed that in order to have this
21 case reopened, she had to pay the filing fee and file a First Amended Petition on or before
22 January 14, 2008.

23 On January 7, 2008, Petitioner filed a Motion to Proceed In Forma Pauperis and a First
24 Amended Petition. The Court again denied Petitioner's request to proceed in forma pauperis and
25 denied the petition because it presented only state law claims. Petitioner was again instructed
26 that in order to have her case reopened, she had to pay the filing fee and file a Second Amended
27 Petition alleging cognizable federal claims, on or before February 14, 2008. Petitioner was also
28

1 advised that if the Second Amended Petition once again failed to state a cognizable federal
2 claim, this action will be subject to dismissal without further leave to amend.

3 On February 6, 2008, Petitioner paid the filing fee pursuant to this Court's order. She
4 also filed a Second Amended Petition. The Second Amended Petition is one again subject to
5 dismissal in accordance with Rule 4 of the rules governing § 2254 cases, because Petitioner has
6 again failed to state a claim cognizable on federal habeas in that she has failed to allege that her
7 state court conviction or sentence violates the Constitution of the United States.

8 Title 28, United States Code, § 2254(a), sets forth the following scope of review for
9 federal habeas corpus claims:

10 The Supreme Court, a Justice thereof, a circuit judge, or a district
11 court shall entertain an application for a writ of habeas corpus in
12 behalf of a person in custody pursuant to the judgment of a State
court only on the ground that he is in custody in violation of the
Constitution or laws or treaties of the United States.

13 28 U.S.C. § 2254(a) (emphasis added). See Hernandez v. Ylst, 930 F.2d 714, 719 (9th Cir.
14 1991); Mannhalt v. Reed, 847 F.2d 576, 579 (9th Cir. 1988); Kealohapauole v. Shimoda, 800
15 F.2d 1463, 1464-65 (9th Cir. 1986). Thus, to present a cognizable federal habeas corpus claim
16 under § 2254, a state prisoner must allege both that she is in custody pursuant to a "judgment of
17 a State court," and that she is in custody in "violation of the Constitution or laws or treaties of
18 the United States." See 28 U.S.C. § 2254(a).

19 Here, Petitioner once again claims that she "was convicted of both receiving and stealing
20 the same property," that "the jury was not instructed that it could not convict me of both stealing
21 and receiving the same property," and "the trial court abused its discretion under Evidence Code
22 352." (Second Amended Petition at 6-8.) In no way does Petitioner claim she is "in custody in
23 violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254.
24 Although Petitioner states that she incorporates by reference her opening brief on appeal as she
25 did in her original Petition, that document is again not attached to her pleading.

26 Further, the Court once again notes that Petitioner may not be able to simply amend her
27 Petition to state a federal habeas claim and then refile the amended petition in this case. She
28 must exhaust state judicial remedies before bringing her claims via federal habeas. Habeas

1 petitioners who wish to challenge either their state court conviction or the length of their
2 confinement in state prison, must first exhaust state judicial remedies. 28 U.S.C. § 2254(b), (c);
3 Granberry v. Greer, 481 U.S. 129, 133-34 (1987). To exhaust state judicial remedies, a
4 California state prisoner must present the California Supreme Court with a fair opportunity to
5 rule on the merits of every issue raised in his or her federal habeas petition. 28 U.S.C. § 2254(b),
6 (c); Granberry, 481 U.S. at 133-34. Moreover, to properly exhaust state court remedies a
7 petitioner must allege, in state court, how one or more of his or her federal rights have been
8 violated. The Supreme Court in Duncan v. Henry, 513 U.S. 364 (1995) reasoned: "If state
9 courts are to be given the opportunity to correct alleged violations of prisoners' federal rights,
10 they must surely be alerted to the fact that the prisoners are asserting claims under the United
11 States Constitution." Id. at 365-66 (emphasis added). For example, "[i]f a habeas petitioner
12 wishes to claim that an evidentiary ruling at a state court trial denied him [or her] the due process
13 of law guaranteed by the Fourteenth Amendment, he [or she] must say so, not only in federal
14 court, but in state court." Id. at 366 (emphasis added).

15 Further, the Court cautions Petitioner that under the Antiterrorism and Effective Death
16 Penalty Act of 1996 (AEDPA) a one-year period of limitation shall apply to a petition for a writ
17 of habeas corpus by a person in custody pursuant to the judgment of a State court. The
18 limitation period shall run from the latest of:

19 (A) the date on which the judgment became final by the
20 conclusion of direct review or the expiration of the time for seeking
such review;

21 (B) the date on which the impediment to filing an application
22 created by State action in violation of the Constitution or laws of the
United States is removed, if the applicant was prevented from filing
23 by such State action;

24 (C) the date on which the constitutional right asserted was
initially recognized by the Supreme Court, if the right has been
25 newly recognized by the Supreme Court and made retroactively
applicable to cases on collateral review; or

26 (D) the date on which the factual predicate of the claim or
27 claims presented could have been discovered through the exercise
of due diligence.

28 28 U.S.C.A. § 2244(d)(1)(A)-(D) (West 2006).

1 The statute of limitations does not run while a properly filed state habeas corpus petition
2 is pending. 28 U.S.C. § 2244(d)(2); see Nino v. Galaza, 183 F.3d 1003, 1006 (9th Cir. 1999),
3 cert. denied, 529 U.S. 1104 (2000). But see Artuz v. Bennett, 531 U.S. 4, 8 (2000) (holding that
4 “an application is ‘properly filed’ when its delivery and acceptance [by the appropriate court
5 officer for placement into the record] are in compliance with the applicable laws and rules
6 governing filings.”); Bonner v. Carey, 425 F.3d 1145, 1149 (9th Cir.) (holding that a state
7 application for post-conviction relief which is ultimately dismissed as untimely was neither
8 “properly filed” nor “pending” while it was under consideration by the state court, and therefore
9 does not toll the statute of limitations), as amended 439 F.3d 993, cert. denied, 127 S.Ct (2006).
10 However, absent some other basis for tolling, the statute of limitations continues to run while
11 a federal habeas petition is pending. Duncan v. Walker, 533 U.S. 167, 181-82 (2001).


12 Rule 4 of the Rules Governing Section 2254 Cases provides for summary dismissal of a
13 habeas petition “[i]f it plainly appears from the face of the petition and any attached exhibits that
14 the petitioner is not entitled to relief in the district court . . .” Rule 4, 28 U.S.C. foll. § 2254.
15 Here, it appears plain from the Second Amended Petition that Petitioner is not presently entitled
16 to federal habeas relief because she has not stated a cognizable claim.

17 CONCLUSION

18 Because Petitioner was informed of these pleading defects and is unable or unwilling to
19 cure them, the Second Amended Petition is **DISMISSED** without further leave to amend. The
20 dismissal is without prejudice to Petitioner to presenting federal claims in a new federal habeas
21 action, which will be given a new civil case number.

22 **IT IS SO ORDERED.**

23
24 DATED: February 22, 2008

25 
26 M. James Lorenz
27 United States District Court Judge
28

JS44

(Rev. 07/89)

CIVIL COVER SHEET

The JS-44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE SECOND PAGE OF THIS FORM.)

I (a) PLAINTIFFS

Pamela J. Baker

Deborah Patrick

(b) COUNTY OF RESIDENCE OF FIRST LISTED PLAINTIFF Madera
(EXCEPT IN U.S. PLAINTIFF CASES)

FILING FEE PAID	
Yes	No
MOTION FILED	
Yes	No
COPIES SENT TO	
Court	Pro Se

FILED
JUN 13 2008
CLERK, U.S. DISTRICT COURT SOUTHERN DISTRICT OF CALIFORNIA BY <u>[Signature]</u> DEPUTY

(c) ATTORNEYS (FIRM NAME, ADDRESS, AND TELEPHONE NUMBER)

Pamela J. Baker
PO Box 1508
Chowchilla, CA 93610
X-15528

ATTORNEYS (IF KNOWN)

'08 CV 1081 J NLS

II. BASIS OF JURISDICTION (PLACE AN X IN ONE BOX ONLY)

- ☐ 1 U.S. Government Plaintiff ☒ 3 Federal Question (U.S. Government Not a Party)
- ☐ 2 U.S. Government Defendant ☐ 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (PLACE AN X IN ONE BOX FOR PLAINTIFF AND ONE BOX FOR DEFENDANT)

- | | PT | DEF | | PT | DEF |
|---|----------------------------|----------------------------|---|----------------------------|----------------------------|
| Citizen of This State | <input type="checkbox"/> 1 | <input type="checkbox"/> 1 | Incorporated or Principal Place of Business in This State | <input type="checkbox"/> 4 | <input type="checkbox"/> 4 |
| Citizen of Another State | <input type="checkbox"/> 2 | <input type="checkbox"/> 2 | Incorporated and Principal Place of Business in Another State | <input type="checkbox"/> 5 | <input type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 | <input type="checkbox"/> 3 | Foreign Nation | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |

IV. CAUSE OF ACTION (CITE THE US CIVIL STATUTE UNDER WHICH YOU ARE FILING AND WRITE A BRIEF STATEMENT OF CAUSE. DO NOT CITE JURISDICTIONAL STATUTES UNLESS DIVERSITY).

28 U.S.C. 2254

V. NATURE OF SUIT (PLACE AN X IN ONE BOX ONLY)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> Marine <input type="checkbox"/> Miller Act <input type="checkbox"/> Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veterans Benefits <input type="checkbox"/> 160 Stockholders Suits <input type="checkbox"/> Other Contract <input type="checkbox"/> 195 Contract Product Liability	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury	<input type="checkbox"/> 610 Agriculture <input type="checkbox"/> 620 Other Food & Drug <input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC881 <input type="checkbox"/> 630 Liquor Laws <input type="checkbox"/> 640 RR & Truck <input type="checkbox"/> 650 Airline Regs <input type="checkbox"/> 660 Occupational Safety/Health <input type="checkbox"/> 690 Other	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark SOCIAL SECURITY <input type="checkbox"/> 861 HIA (13958) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(e)) FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS - Third Party 26 USC 7609	<input type="checkbox"/> 400 State Reappointment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce/ICC Rates/etc. <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 810 Selective Service <input type="checkbox"/> 850 Securities/Commodities Exchange <input type="checkbox"/> 875 Customer Challenge 12 USC <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 892 Economic Stabilization Act <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 894 Energy Allocation Act <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice <input type="checkbox"/> 950 Constitutionality of State <input type="checkbox"/> 890 Other Statutory Actions
REAL PROPERTY <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Tort to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	CIVIL RIGHTS <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 444 Welfare <input type="checkbox"/> 440 Other Civil Rights	PRISONER PETITIONS <input type="checkbox"/> 510 Motions to Vacate Sentence Habeas Corpus <input checked="" type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights	LABOR <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt. Relations <input type="checkbox"/> 730 Labor/Mgmt. Reporting & Disclosure Act <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Empl. Ret. Inc. <input type="checkbox"/> Security Act	

VI. ORIGIN (PLACE AN X IN ONE BOX ONLY)

- ☒ 1 Original Proceeding ☐ 2 Removal from State Court ☐ 3 Remanded from Appellate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from another district (specify) ☐ 6 Multidistrict Litigation ☐ 7 Appeal to District Judge from Magistrate Judgment

VII. REQUESTED IN COMPLAINT: ☐ CHECK IF THIS IS A CLASS ACTION UNDER f.r.c.p. 23

DEMAND \$

Check YES only if demanded in complaint:

JURY DEMAND: ☐ YES ☐ NO

VIII. RELATED CASE(S) IF ANY (See Instructions): JUDGE

Docket Number

DATE 6/13/2008

SIGNATURE OF ATTORNEY OF RECORD

CR

R. Baker